IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1050

ANNA deKAM, et al., Appellants,

vs.

CITY OF SOUTHFIELD, et al., Appellees.

ON APPEAL FROM THE COURT OF APPEALS

FOR THE STATE OF MICHIGAN

EUGENE OSTROWE
27301 W. Seven Mile Rd.
Detroit, MI 48240
Counsel for Appellants

MICHAEL B. SERLING
300 Congress Building
30555 Southfield Rd.
Southfield, MI 48076
Of Counsel

STANLEY C. SHAPIRO
300 Congress Building
30555 Southfield Rd.
Southfield, MI 48076
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CITATIONS

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JURISDICTIONAL STATEMENT

Appellants[1] appeal from the judgment of the Michigan Court of Appeals, entered on April 19, 1977, affirming the decision of the trial court upholding the Constitutionality of the notice by publication provisions of Michigans' Zoning Enabling Act, and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial constitutional question is presented. Appellants application for leave to appeal to the highest court of the State, was considered and denied by the Michigan Supreme Court.

OPINION BELOW

The opinion of the Court of Appeals for the State of Michigan, KARPENKO, et al. vs. CITY OF SOUTHFIELD, et al., is reported in 75 Mich App 188, (1977).

Copies of the opinion, the judgment of the Circuit Court and the order from the Michigan Supreme Court denying petitioners' application for leave to appeal, are attched hereto as Appendix A.

JURISDICTION

This suit was brought under the United States Constitution, 14th Amendment due process and equal protection seeking damages and injunctive relief.

The judgment of the Circuit Court for the County of Oakland was entered on July 7, 1976, the judgment of the Michigan

Court of Appeals was entered April 19,1977, and the Order denying appellants application for leave to appeal was entered by the Michigan Supreme Court on October 25th, 1977. The notice of appeal to the United States Supreme Court was filed in the Michigan Supreme Court on January 19, 1978, within 90 days of the order of the Michigan Supreme Court.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1257(2) The question of the validity of the notice by Newspaper publication requirement pursuant to the Michigan Zoning Enabling legislation was in issue as being repugnant to the due process requirements of the United States and Michigan Constitutions, and the decision of the Circuit Court and the Court of Appeals was in favor of its validity.

The following decisions sustain the jurisdiction of the United States Supreme Court to review on direct appeal in this case:

Davidson v. New Orleans, 96 U.S. 97;

Del Castillo v. McConnico, 168 U.S. 674;

Pittsburgh, etc. R. Co. v. Backus, 154 U.S. 421;

Travelers Health Ass'n v. Com of Va, ex rel, State Corp, Comm. Va, 339 U.S. 643;

Bells Gap. R. Co. v. Pennsylvania, 134 U.S. 232(1890).

Supreme Court jurisdiction to review on direct appeal was granted in the above decisions where the validity of statutory procedural due process was drawn into question and the statute as construed by the highest state court violated the Constitution by depriving appellants of property without due process of law.

QUESTIONS PRESENTED

Whether Michigans Zoning Enabling Act, which provides, in part, that the local legislative body shall provide notice by newspaper publication prior to public hearing upon rezoning requests, is repugnant to the United States Constitution in that it denies due process of law to adjoining landowners encumbered by negative reciprical easements including the property to be rezoned without requiring actual notice of said hearing.

Whether statutes failing to provide for actual notice to readily identifiable parties regarding hearings to rezone property encumbered by negative reciprical easements constitute an unconstitutional taking of substantial property rights without due process of law; or whether property abutting, adjacent and in close proximity to rezoned property is to be afforded the same Constitutional rights.

STATUTES INVOLVED

Michigan Zoning Enabling Act,

Michigan Compiled Laws Annotated (MCLA)

Sections 125.581 et seq., specifically

the notice provision, MCLA Section 125.584.

The relevant portion reads as follows:

> "The legislative body of any city or village may provide by ordinance for the manner in which such regulations and boundries of districts or zones shall be determined and enforced, or from time to time, amended, supplemented or changed: provided, however, that a public hearing shall be held before any such regulations shall become effective: and provided further, that not less than 15 days notice of the time and place of such public hearings shall first be published in an official paper or a paper of general circulation in such city or village, and that not less than 15 days notice of the time and place of such public hearing shall first be given by registered United States mail to each public utility company and to each railroad company owning or operating any public utility or railroad within the districts or zones affected, and a hearing be granted any person interested at the time and place specified..."

United States Constitution, 14th Amendment.. due process requirement and 5th Amendment no person shall be deprived of life, liberty or property without due process of law.

Michigan Constitution, Article I, Section 17

STATEMENT

Appellee, LAWRENCE INSTITUTE OF TECHNOLOGY, hereinafter LIT, owner of a 14 acre parcel of land sought rezoning in 1968 from single family residential to high rise classification. Appellee, CITY OF SOUTHFIELD, hereinafter, CITY, in 1968, passed City Ordinance No. 576 pursuant to the authority of the zoning enabling act, changing the classification of the subject property from single family residential to high rise classification following the procedure set forth below.

Appellee, ETKIN, JOHNSON & KORB, INC., herein after, BUILDER, undertook the construction of said structure.

Six Appellants own land contiguous with and directly abutting the 14 acre parcel, two appellants own land adjacent and within 300 feet of the rezoned parcel and all remaining appellants own land in close proximity to the rezoned property and within the subdivision.

At the time of the petitions of LIT to

rezone the property from single family residential to a high rise classification, all of the homeowners and LIT had deed restrictions and negative reciprocal easements restricting the use of all of the properties in question to single family residential use and all dwellings could not exceed one and one-half stories in height.

At the time of the petition of LIT to rezone the subject property in 1968, a single family residential dwelling stood on the 14 acre site, said dwelling was one and one-half stories in height. Said dwelling existed on the subject parcel until the 7th day of May, 1976, when demolished by the BUILDER.

Notice of the public hearing, wherein the proposed zoning change would be decided, was disseminated in a newspaper of general circulation within Southfield at least 15 days prior to the June 10, 1968, public hearing.

Public utilities with easements on the

site were notified by certified mail, return receipt requested.

At the June 10, 1968, public hearing, the record reflects that the public hearing was open, no one wished to be heard and the public hearing was closed, Whereupon the requested zoning change was granted.

None of the affected homeowners had notice of the impending change and none were present to offer their objections at the public hearing.

On June 28, 1976, suit was instituted in the Oakland County Circuit Court by the homeowners, seeking a temporary and permanent restraining order and injunction against the CITY, the BUILDER and LIT, appellees herein, from construction of the nine story dormitory and for damages for the injury to the property rights of the homeowners.

At the time of the institution of suit, progress on the dormitory was well below the first level and only a slight amount

of work had been accomplished above ground level.

Two days after the institution of suit, on June 30, 1976, a Show Cause hearing was held upon the issue of preliminary injunctive relief, The circuit court judge denied preliminary injunctive relief, but did admonish the defendants (Appellees) that they were building at their own risk and that if the Plaintiff's prevailed. he would order the structure demolished.

The Court and all of the counsels agreed that since the issues were primarily of law, an attempt would be made to expedite the trial and to stipulate as to facts whereever possible.

As a result, the relevant facts were agreed upon and stipulated to in open court by the verbal answer of all defendants to the verbally amended complaint.

On July 1, 1976, three days after the institution of suit an expediated trial on the merits was held whereupon the trial court issued an oral decision and

opinion (copies of which are included in the appendix) dismissing the complaint with prejudice. On July 7, 1976, a final judgment, denying the prayer of the complaint for preliminary and permanent injunctive relief and dismissing the complaint, was entered, On July 16, 1976, Plaintiffs filed a claim of appeal in the Court of Appeals (Michigan). On July 22, 1976, a motion for Stay of Proceedings and Injunction Without Bond Pending Appeal and for shortening the time of filing briefs, was filed by plaintiff's in the Court of Appeals. On July 26, 1976, defendant, LIT, filed with the Supreme Court of Michigan an application for bypass appeal. On August 31, 1976, the Court of Appeals entered its interlocutory order denying plaintiffs Motion for Stay of Proceeding and Injunction Without Bond Pending Appeal and granting plaintiffs Motion shortening the time for filing briefs.

On April 19, 1977, the Michigan Court of Appeals entered its decision denying plain-

tiffs appeal. A copy of the opinion is included in the appendix.

On October 25, 1977, the Supreme Court for the State of Michigan entered an order, considering plaintiffs application for leave to appeal, but denying same. A copy of said order in included in the appendix.

The Constitutional sufficiency of notice to property owners by newspaper publication as it applies to property owners encumbered by negative reciprocal easements was raised in appellants initial pleadings (a copy of which is attached hereto in the appendix), at the circuit court level and in each appeal proceeding thereafter. The Circuit Court made a finding (Transcript, T page 84, included in appendix) that the notice requiement of the enabling act (was) is sufficient due process under both the Constitution of the Stat of Michigan and the United States.

The Michigan Court of Appeals held that notice by publication was sufficient, noting that, "in balancing plaintiffs right to notice against economy and practicality in determining the form of notice, we hold notice by publication is sufficient. (Opinion page 5, See appendxi)

The Court of Appeals opinion stated further, "although we agree that news-

paper notice is not the type of notice

which would inform the greates number of people, any step requiring individual mailed notice should be taken by the legislature and not by this Court." (Opinion page 5, See appendix).

The Court of Appeals then addressed the most significant relevant Supreme Court decision, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) and the major and recent Michigan case concerning notice requirements,

> "Turning to the circumstances of this case, we face the inevitable: The message of Mullane, and Alan v Wayne County, 388 Mich 210; 200 NW2d 628 (1972), is that any determination of the constitutionality of a particular statutory notice scheme will be essentially judgmental. Our concern, in the absence of hard and fast rules, is to avoid the unpredictability generated by approving a totally unrestrained ad hoc approach.
>
> "While we have determined that plaintiff has a right to notice, the balancing approach of Mullane and Alen requires us to specifically weigh plaintiffs' right against the factors of economy and practicability in determining the form that this notice must or should take. In Mullane, plaintiffs were the beneficiaries of a trust; the Court expressly found

their property interest to be 'substantial', and notice by publication only was deemed insufficient."

Turning to the second issue, plaintiff raised the taking of a substantial property right (deed restrictions and negative reciprocal easements) without due process of law in their initial pleadings, at the Circuit Court level and in the Court of Appeals and in their application for leave to appeal to the Supreme Court.

The Circuit Court finding regarding taking of property rights is found in the transcript, page 82:

> "There is no question that stipulated facts show that will have an unpleasant effect, and although there are aspects about the proximity of an educational institution which sometimes enhances the value of property, I think you would have to conclude in this case that the only logical inference is that an educational institution of the type that we are here concerned with will depreciate the value of the adjacent property."

The Michigan Court of Appeals, while discussing the interests involved in Dow v. State of Michigan, 396 Mich 192,

240 NW 2d 450(1976)[2] distinguished the loss of significant real property interests which were being foreclosed upon by the State of Michigan under a tax sale from those property rights created as adjacent property owners in the case at bar, stated:

> "In the present case, plaintiffs interests arise from their status as adjoining and neighboring property owners and their interests in the rezoning of a parcel of land in close proximity to their property is not as significant as the interests of the plaintiffs in Dow, supra,. It has been held that nearby property owners have no vested interest in zoning classifications."

Defendant-appellees further argued at trial and at the appeal level that it would be stretching the limits of procedural due process to require individual notice to all who claim an "interest" in, or to be affected by a proposed rezoning petition. Yet, California and Texas legislation require mailed notice to property owners within a given number of feet of property to be rezoned.[3]

Apparantly the legislatures of these states are cognizant of the interest created as the result of the status of being in close proximity to property to be rezoned.

Plaintiffs had argued in their pleadings, at trial and at the appeal levels that negative reciprocal easements created a property right which afforded them a 'significant' interest in the 1968 rezoning hearing.

However, the Court of Appeals opinion was not to consider the deed restrictions as any interest whatsoever, let alone substantial: (opinion, page 4)

> "We find the existence of deed restrictions to be irrelevant to the question of whether individual mailed notice of proposed rezoning is constitutionally required."

The Court of Appeals then compared the appellants interests as adjacent property owners with those substantial property interests as beneficaries of a trust which were found to be substantial in Mullane, supra.

"In balancing plaintiffs'(appellants) rights to notice against economy and practicality in determining the form of notice," found notice by publication to be sufficient. The Court of Appeals then compared appellants interests, "qualitatively less compelling than the interests recognized in Dow, supra."

Defendants contended in their closing argument, at trial, that amendment of zoning is legislative in character and therefore due process of law is not required, and citing the 9th Circuit holding;

> "However, in legislation or rule-making, there is no constitutional right to any hearing whatsoever."

Willapoint Oysters v. Ewing, 174 F. 2d 676, (CA 9th Cir) Cert den 338 U.S. 860.

Appellee, LIT, at the Court of Appeals and the Supreme Court further argued that the nature of government action is legislative in character and does not require actual individual notice.

THE QUESTIONS ARE SUBSTANTIAL

(a)The issue of the Constitutionality of the zoning enabling legislation has been before this Court on numerous occasions and the decision has been in favor. However, Constitutional challenges to statutory requirements of notice by newspaper publication regarding rezoning hearing have not been considered by this Court. Although, other forms of procedural due process challenges resulting in a taking of property have been heard, see Davidson, supra, Bells Gap, supra,.

The major case that this Court has decided regarding procedural due process claims regards the fiction of actual notification by newspaper publication in Mullane, supra. Here the Supreme Court found notice by newspaper publication to beneficiaries of a trust resulting in loss of substantial property rights by judicial proceedings to be Constitutional insufficient.

Furthermore, this Court has never determined the character of deed restrictions, equitable servitudes or negative reciprocal easements as creating "substantial" property rights which should be protected from unconstitutional 'taking' without due process of law, ie. adequate notice and an opportunity to be heard.

This Court has not hertofore classified zoning enabling legislation as legislative or judicial in nature nor recognized that zoning enabling legislation may be different in nature than rezoning hearing or amendments. These last two points would constitute underlying decisions before this Court could render a decision to sanction notice by publication regarding rezoning hearings as Constitutionally sufficient.

(b) Plenary consideration by this Court is necessary to clarify doubts as to the meaning of its decision in Mullane, supra. The question presented herein presupposes application of Mullane, requiring that the method of notice selected must give reasonable assurance of actually giving notice in light of other available means assuaged by a balancing test; the property owners rights against the factors of economy and practicability in determining the form that this notice should take.

The enigma created by classification of a rezoning hearing as legislative or quasi-judicial and the resultant procedural due process notice requirement demand this Court identify the nature of a rezoning hearing before assigning due process status.

The second underlying decision for this Court is whether property rights are created by deed restrictions, or more

broadly, what guidelines can legislatures rely upon to identify 'substantial' property rights or who are identifiable parties in a rezoning hearing.

In Mullane, supra, this Court stated that notice by publication was acceptable is used as a supplement to other action. The question as to what other action was required and under what circumstances should supplemental action be Constitutionally required.

In the case at bar, the names and addresses of the parties herein, asserting a taking of substantial property rights were easily ascertainable by the property owner seeking rezoning and the City conducting the hearing. Since the property was subject to the deed restrictions, of record, the petitioner and the City were on notice of the affected property rights.

Appellants assert their identity was readily available and their deed restrictions constituted a substantial property

interest which was taken by state action without procedural due process of law. By all readings, Mullane, supra, should apply to the case at bar to find the Michigan notice provisions Constitutionally incompatible, yet its meaning remains unclear and its message unanswered.

PUBLIC IMPORTANCE

(c) Since the inception of zoning and its Constitutional compatibility the public has considered this legislation of great importance. Zoning questions have become a matter of routine, to the point that the Chief Justice of the Supreme Court would prefer to refer zoning matters to a lesser Court. U.S. News & World Report.

Rezoning affects property values and this is of importance not only to appellants but to every property owner.

Review of state legislation discloses various degrees of notice requirements to be given adjacent property owners extending the continum from no notice whatsoever to actual notice mailed to property owners within a given distance of the subject property. The majority view provides notice by newspaper publication denying property owners the right to

actual notice and justifying the position by adhering to the legislative nature of rezoning. Query; why any form of notice is required in view of the Supreme Court holdings that zoning ordinances are legislative acts of municipalites in Village of Euclid v. Ambler Realty, 272 U.S. 365, 388; and Village of Belle Terre v. Boraas, 416 U.S. 1,4(1974).

One factor to be examined by this Court is the characterization of rezoning amendments or hearings as legislative or quasi-judicial functions.

A determination of rezoning as a judicial or quasi-judicial function would mandate application of Constitutional due process and equal protection .

However, characterization of rezoning as legislative would not necessarily preclude application of Constitutional requirements. Due process requirements

would be necessary if this Court would catagorize deed restrictions, equitable servitudes or negative reciprocal easements as 'substantial' property rights.

Therefore, rezoning involving property encumbered by deed restrictions of record affecting readily identifible property owners would constitute Unconstitutional 'taking' of property rights without due process of law unless Constitutionally adequate notice and opportunity to be heard were provided nearby landowners by the state or municipality.

The 1st Circuit has stated that a taking no longer requires a direct physical appropriation but included injuries which constituted a substantial interference with rights of use, enjoyment, and possession. Town of Bedford v. U.S., 23 F.2d 453(1st Cir 1927)

This Court in U.S. v. Cress, 243 U.S. 316(1917) held that htere were Constitutional takings even though the government

had not directly appropriated the title, possession or use of the property.

The State of Michigan has held that restrictive covenants become a compensable property interest, Allen v. City of Detroit, 133 N.W317(Mich 1911).

Ownership of a right to restrict the use of a certain parcel is a property right. Yet the Michigan Court of Appeals held in the case at bar, that the deed restrictions irrelevant to the issue of Constitutional due process in rezoning hearings, Opinion, page 5, see appendix.

Recent law review article, notorious for indication of trends investigate the legislative-judicial conflict. See 50 Journal Urban Law 129(1972) and 33 Ohio State Law Journal 130(1972).

CONFLICT IN U.S. COURT OF APPEALS

(d) It appears as though a conflict exists in the United States Court of Appeals decisions regarding the characterization of rezoning, as legislative or judicial.

Willapoint Oysters v. Ewing, 174 F.2d 676(CA 9th) cert den 338 U.S. 860, rehearing denied, cited by appellees for the legislative nature of rezoning:

> " However, in legislation or rule-makeing there is no Constitutional right to any hearing whatsoever."

Cited to support this holding was the following language from an opinion by Justice Holmes;

> "Where a rule of conduct applies to more thatn a few people, it is impracticable that everyone should have a direct voice in its adoption, The Constitution does not require all public acts to be done in town meetings of an assembly of the whole."

Some courts have held that when a soning commission acts on a rezoning petition, it acts in a judicial or quasi-judicial capacity, Donovan v. Clarke, 222 F. Supp 632, 634(DDC 1963)

See also Zoning due process, Adjudication Decision Inherent in Tract Rezoning Requires

the Decision Maker to Adhere to Standards of Minimum Due Process, 8 Georgia Law Review 254, Fall 1973.

In contrast the 5th Circuit has determined that a zoning hearing must comply with requirements of due process. Hornsby v. Allen, 326 F.2d 605(5th Cir 1964) and McCleskey v. Barrett, 386 F.2d 159 (5th Cir 1967)(per curiam).

Finally, in South Gwinnett Venture v. Pruitt, 482 F.2d 389 (5th Cir. 1973) the Court applied the Hornsby, supra, rationale to rezoning actions, holding that the zoning commission must adhere to standards of minimal due process when considering tract rezoning applications. The court distinguished those actions of an administrative body which are legistative from those which are adjudicative, as did the Hornsby, supra, court, and held that standareds of minimal due process attach to administrative actions which are quasi-judicial in nature.

RECOGNITION BY COURT BELOW

(e) The Michigan Court of Appeals recognized the Constitutional due process argument of appellant and decided against their claim. The Court held that Constitutional due process was satisfied by the existing legislation calling for notice of rezoning hearing by publication in a newspaper of general circulation 15 days prior to the hearing. The issues were again raised before the Michigan Supreme Court and the decision was to allow the lower courts opinion to stand by a deniel of appellants application for leave to appeal.

(f) The final reason that the issue is substantial follows from the conflict in state legislation and State Court decisions.

The majority opinion, manifested by legislation and cases hold procedural due process satisfied by newspaper publication. However, another minority position requires additional action such as actual mailed notice to property owners last known address in the general vicinity. Another position is that adjacent property owners are not parties of interest and therefore no notice whatsoever is constitutionally required. See 96 ALR 2d 449 and later case service for summary of State legislation and decisions.

Also see 38 ALR 3d 167, Who are parties entitled to notice.

Can it be implied from the lack of consistency in notice requirements for rezoning amendments that the legislative characterization is incorrect? Is the

existing legislation hypocritical in that it provides some form of notice yet characterizes rezoning hearings as legislative in nature, therefore not requiring any notice whatsoever.

The issue is unsettled in the State law and unresolved by this Court. Application of Mullane, supra, to the case at bar must result in a minimum standard promulgated by this Court and a characterization of rezoning which will resolve its enigma.

Further, the identification of deed restrictions in the nature of negative reciprocal easements as property rights, compensable after their interference without Constitutionally mandated procedural due process, is an underlying issue essential to be answered before a decision can be rendered above.

CONCLUSION

Appellants argue that the notice provision of Michigan's Zoning Enabling Act is repugnant to the Michigan and United States Constitution in that it denied them procedural due process of law and as applied to them constituted an Un-constitutional taking of substantial property rights.

These property rights were created as a result of deed restrictions and negative reciprocal easements encumbering Appellants property and the property of Appellees which was rezoned and are substantial in that the marketability and values of the property are adversely affected by the rezoning.

Appellees contend that rezoning was legislative in nature and as a result procedural due process is not mandated by the United States Constitution.

Appellants contend that rezoning should be characterized as quasi-judicial rather than legislative, therefore, mandating application of Constitutional procedural due process.

However, that characterization is not required to compel adherence to Constitutional procedural due process, if substantial property rights are 'taken' without procedural due process of law.

Wherefore, Appellants pray this Honorable Court grant their prayer for relief contained in the Complaint below.

EUGENE OSTROWE
27301 W. Seven Mile Rd.
Detroit, Michigan 48240
Counsel for Appellants

FOOTNOTES

1. Appellants in this action who have not expressley requested to be excluded as parties in this action:

   ANNA deKAM, JOAN deKAM, BORIS KARPENKO, TETIANA KARPENKO, VICTOR BRADLEY, MARGARET BRADLEY, ROBERT PETROVICH, BORICA PETROVICH, CARL GILGALLEN, PAT GILGALLEN, HERBERT FRIEBE, RUTH FRIEBE,DONALD LAHTI, HANNAN LAHTI, WILLIAM WINER, ROSE WINER, THADDIUS KONECKI,WANDA KONECHKI, RONALD HULEWICZ, SUSAN HULEWICZ, ROBERT CORRIGAN, ANN CORRIGAN, RICHARD BONDIE, ELIZABETH RATKUS, CHARLETTE MARTINUZZI, GUIDO MARTINUZZI, DEL SCODELLARO, ROSE SCODELLARO, MARIAN VALDES, GEORGE BEAUDIAN, EDNA BEAUDIAN, ESAM SARAFA, JOSEPHINE SARAFA, GEORGE MALESKY, DORIS MALESKY, STANLEY SHAPIRO, EDMUND KURKOROWSKI, IRENE KURKOROWSKI, JACK CROCKER, GLORIA CROCKER,RONALD BARRY, NORMA BARRY, PHILLIP CANDELLA, RITA CANDELLA, NICK MADIAS, ORTON HAMILTON, LOIS HAMILTON, DAVID SILVERMAN, PAT SILVERMAN.

2. See text of Court of Appeals Opinion on page 24 of Appendix

3. See pages 39 through 41 of Appendix

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FOR THE STATE OF MICHIGAN

APPENDIX

INDEX FOR APPENDIX

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY

OF OAKLAND

BORIS KARPENKO, TETIANA KARPENKO, ANNA deKAM, JOAN deKAM, VICTOR BRADLEY, MARGARET BRADLEY, ROBERT PETROVICH, BORICA PETROVICH, MATHEW ST. ANGELO, JANET ST. ANGELO, CARL GILGALLEN, PAT GILGALLEN, JOSEPHINE LYNCH, HERBERT FRIEBE, RUTH FRIEBE, DONALD LAHTI, HANNAN LAHTI, WILLIAM MINER, ROSE WINER, THADDIUS KONECKI, WANDA KONECHKI, RONALD HULEWICZ, SUSAN HULEWICZ, ROBERT CORRIGAN, ANN CORRIGAN, RICHARD BONDIE, ELIZABETH RATKUS, CHARLETTE MARTINUZZI, GUIDO MARTINUZZI, DEL SCODELLARO, ROSE SCODELLARO, MARIAN VALDES, GEORGE BEAUDIAN, EDNA BEAUDIAN, ESAM SARAFA, JOSEPHINE SARAFA, RAY STEVENS, MARGARET STEVENS, GEORGE MALESKY, DORIS MALESKY, STANLEY SHAPIRO, EDMUND KURKOROWSKI, IRENE KURKOROWSKI, JACK CROCKER, GLORIA CROCKER, RONALD BARRY, NORMA BARRY, PHILLIP CANDELLA, RITA CANDELLA, NICK MADIAS, MARIAN MADIAS, ORTON HAMILTON, LOIS HAMILTON, DAVID SILVERMAN, PAT SILVERMAN,

Plaintiffs

vs. C/A 76-141817 AZ

CITY OF SOUTHFIELD, a municipal corporation, A.J. ETKIN CONSTRUCTION COMPANY, a Michigan corporation, and LAWRENCE INSTITUTE OF TECHNOLOGY, a Michigan non-profit corporation, jointly and severally,

Defendants

COMPLAINT FOR INJUNCTIVE
RELIEF AND DAMAGES

NOW COME Plaintiffs by and through their Attorney, MICHAEL B. SERLING, and for their Complaint state the following:

*

*

*

29. Said zoning change would also adversely affect the physical ameneties and scenic aspects of the property owned by the Plaintiffs.

30. As a result of the Defendant, City of Southfield's actions in notifying property owners pursuant only to the Zoning Enabling Act at the public hearing, said actions failed to inform the Plaintiffs of any action which would have an adverse effect on their property rights. As a result, not one property owner appeared at the public hearing wherein the zoning change as aforesaid was considered by the Defendant,

CITY OF SOUTHFIELD, and approved by said body.

31. As a result of the procedures employed by the Defendant, CITY OF SOUTHFIELD, the Plaintiffs suffered a deprivation of their property rights without due process of law, in violation of the constitution of the State of Michigan and the Constitution of the United States.

*

*

*

WHEREFORE, PLAINTIFF, pray for the following relief:

(a) That the City or Southfield Ordinance No. 576 passed in June or 1968 be set aside and held for naught and be declared unconstitutional and unenforceable.

(b) That the zoning classification of said property of real estate owned by LAWRENCE INSTITUTE OF TECHNOLOGY that existed prior to June, 1968 and prior to Southfield City

Ordinance No. 576 be re-established and that inconsistent with such zoning class be prohibited.

(c) That this Honorable Court declare the Zoning Enabling Act, MCLA 125.581 et seq., unconstitutional.

(d) That this Honorable Court enter its Order for a temporary restraining order and preliminary injunction, either ex-parte or upon hearing, restraining defendants, their agents attorneys, employees, servants and persons in active concert with them, from taking any action in active concert with them, from taking any action in the furtherance of building or construction a dormitory on the subject premises owned by the defendant, during the pendency of their action.

(e) That upon a final determination of the merits of this case, this Court enter its orde for a permanent injunction restraining defendants from building or constructing a nine story dormitory on the premises of the property owned by defendant.

(f) That this Court grant money damages to Plaintiffs herein against the defendant,

jointly and severally, commensurate with the proofs submitted by Plaintiffs as to the loss of their property values, together with interest from the date hereof.

_____

Attorney for Plaintiffs'

CIRCUIT COURT OPINION

Transcript, pages 75 - 84

THE COURT: Well, the Court is of this opinion: The Court is of the opinion that, first of all, I would like to make the observation that the Complaint filed by the plaintiff in the opinion of this Court was definitive adequately addressed all the facts on the legal issues to be raised, It was succinct in doing so. The conduct of counsel for the Plaintiffs and the conduct of defendants in the opinion of the court was in the finest tradition of the bar. I would like to compliment counsel for all parties, because I thank too often the public is of the opinion that the lawyer job is to obfuscate and delay and fog the issues. I think that the saving in time to the Court and to the public and the possible damage cone to whichever litigant ultimately is established to be in the right is immeasurable by the conduct of counsel in the case.

In other words, you have expeditiously gotten rid of all the dead wood, have agreed

on a stipulation of facts which is fair to all parties. The Court feels that is is imperative that this comment or observation be made. The presentation of the law that you submitted by way of brief and ciration and argument was learned, skilled and in the best type of tradition. It makes a Judge's job that much easier when this type of industry goes into the preparation of a case.

For that reason the Court in this case is not going to assess any costs. The Court I think in a case of this kind, in my tenure on hte bench this is the first time I have not seen fit to award costs in favor of the prevailing party and against the losing party. But in this case the Court in its exercise of discretion is not going to tax cost, for the reason that counsel have so expedited the matter that the Court is of the opinion that the award of costs would further discourage counsel to

act in this fashion in future cases.

To begin with, this Republic survived for almost 150 years with no zoning laws whatsoever. With the advent of the case of the Village of Euclid, Ohio -- rather, Amber Realty against the Village of Euclid, Ohio -- recollection fails me, but in 1911 or 1921, thereabouts -- the Supreme Court of the United States said legislatures could enact Zoning Enabling Acts. And for the next 50 years with enthusiasm the United States of America bound itself in many ingenuous ways. Zoning ordinances largely were not drafted by lawyers but by planners and city managers.

We so zoned outselves and restricted ourselves that in the opinion of the Court one of the more predominant social reason for the decay of the big cities of the United States and creation of the inner city ghetto has been restrictionive zoning legislation.

Now, in the last five years the writes and the planners have begun to swing to this

conclusion: Witness, they have written concerning the examples of the City of Montreal and Mexico City, Houston, Texas as examples where you have a prosperous vibrant inner city with little or no ghetto because of social impact of a lack of restrictions in zoning legislation.

The Court is of the opinion that there are advantages to zoning legislation and there are disadvantages. One of the disadvantages is that whenever under the police power -- and it is important to recognize that zoning legislation is under the police power; it is a criminal act and provides for criminal punishment. It creates a fraud upon the public to the extent that people feel they can rely in this.

I would challenge counsel in this case al counsel, that if they were to go home tonight and inquire of their wives the difference between a covenant running with the land or a building restriction and a

zoning ordinance there isn't one of your wives who could give you even the ghost of an explaination. In fact, if you were to suggest to them there was a difference they would not condone your argument. It takes a legal mind at least seven years' of education before you begin to comprehend the absurd distinction. The building restriction, the covenant with the land, as counsel are well aware -- and one of the interesting things about this case is that although counsel pleaded it in the Complaint and briefed it and furnished some authority, counsel in their argument stayed away from the covenant argument because, being wise and learned counsel, they reached the conclusing that really was not an issue in the case.

But in passing I feel I must make the observation that if there were a building covenant, a restriction binding on the land, this lawsuit wouldn't be here.

That the nine-story dormitory would not have begun to be erected. But the building restrictions themselves specifically provided that these covenants and restrictions are to run with the land and shall be binding on all parties and persons claiming under them until January 1, 1970, at which time said covenants and restrictions shall terminate.

Now, these restrictions are binding under the Constitution of the United States which says you cannot impair the right of contract. But when you expressly state that they expire you can't then lodge, obviously, an argument that by implication you have negative reciprocal easements which somewhat continue a general plan. To the contrary, as far as restrictions are concerned, each one of those single family dwellings now has a right, that if his property would enhance in value 10-fold by the use of that land for a factory, a piggery, a farm, he would have a complete right under our

Constitution to do so, unless prohibited to do so by a binding police-power punitive ordinance, such as a zoning ordinance.

So the Court is of the opinion, as I am sure both counsel are, that we have no question of restrictive covenants. That these restrictions are just not binding and no negative reciprocal easements could possibly exist under those circumstances.

As to the question of the Zoning Enabling Act and the particular ordinance in question, I think it is safe to say that with the possible exception of the City of Detroit -- and I would suggest, too, counsel, if you were to take a numerical count, there have been more zoning ordinances that have gone to the Federal District Court and to the State of Michigan's Supreme Court out of the City of Southfield than, I guess it would be the City of Detroit. Certainly many times more than any other municipality of the state, with the possible exception

of the City of Troy which is now racing to compete with Southfield.

In each and every one of those cases, as Mr. Freedman I think pointed out, lawyers did not raise this constitutional question of due process and the necessity for any kind of notice, other than that which was provided. They have been litigated from the standpoint of the time factor, i.e. if the statute required 14 days -- I think Wenner against Southfield says 13 days is not sufficient and therefore the ordinance is not enacted, is unconstitutional, void, of no force and effect.

But the issue raised in this case -- my almost 30 years of experience in the field convinces me Mr. Freedman is correct, that the question has not been raised, and it was not raised because it was generally thought in the legal mind, which usually shows in such cases a singular lack of imagination, there was no basis for it.

But about 28 years ago Mullane, Hanover

trust, determined that in probate of an estate, or as Mr. Tracy said, the judicial type of proceeding, it was necessary to give more than advertising, which was lip service. That you literally had to, when you were taking away a vested right of some kind, give real notice. And the courts obviously wouldn't condone people who say, well, they didn't get a certified notice, etc. But literally you had to have substantial notice in order to cut off a right.

This Hanover krust step in broadening the constitutional requirements of due process remained as it was for many years until Dow against the State of Michigan, for example, which is typical of a number of cases in the United States, which indicated that when y you take a man's home away from him by way of tax foreclosure or any other type of governmental action which is directed to his piece of property that you must give a more adequate form of notice than merely cursory publication.

So possibly for those reasons, and I like to think it is for those reasons, that the growth of the law is this due process regard has taken 200 years to develop. The question has not been raised in this case.

This Court is of the opinion that the function of the trial courts largely should be restrained to the function of finding of facts, examining of candor, demeanor, the weight to be ascribed, the credibility of witnesses and documents submitted, and then contrasting those with the law of the land, and render a fair and just result.

In this case we have on the one hand a private corporation which, under our Constitution, has all of the rights of a private citizen in attempting to build a nine-story dormitory, obviously in close proximity to single-family residences. There is no question that stipulated facts show that will have an unpleasant effect, and although there are aspects about the proximity of an educational

institution which sometimes enhances the value of property, I think you would have to conclude in this case that the only logical inference is that an educational institution of the type that we are here concerned with will depreciate the value of the adjacent property. That would seem to be a stipulated fact.

The question is, is the alienation of property and the free use of property to be permitted in this case. This Court is of the opinion thatyou start with the premise that a property owner has a right to use his property as he sees fit, unrestricted by anything except where the law specifically prohibits it. And the zoning ordinance could prohibit it. The zoning ordinance in this particular case obviously does not now prohibit it, but did previously as did the now-extinct covenants running with the land.

The question as to whether or not the notice was adequate under the state in the opinion

Court has been passed upon literally hundreds of times, and each time the notice has been construed to be adequate, although the Court must concede Mr. Freedman's observation that this particular argument has never been raised before. At least it is not apparent from a reading of the advance sheets and the reported cases. This is what we lawyers are bound by.

The Court is further of the opinion that trial Judges are not supposed to be adventurers in the area of constitutional rights, and that any diminution or growth in the requirements of due process must take place by way of constitutional amentment, on the one hand, or in the field we are talking about, due process particularly, the Fifth and Fourteenth Amendments, in the highest courts of appellate review. This is the place where change in social facts and social attitudes does have an impact on the constitutional law.

Unless it is a case in which a litigant is

going to lose his opportunity to present the constitution issue on appeal this Court is firmly of the belief that trial Courts should not vary from the stated condition of the law. This Court is of the opinion that stated condition of due process in the state of Michigan and in the United States of America would prohibit this Court from granting the relief required by the plaintiff. The Court is bound by the literally dozens of cases, dozens of cases involving the City of Southfield alone, which have established that the notice requirement of the Enabling Act, and the ordinance in turn which has been in effect in the City of Southfield, is sufficient due process under both the Constitution of the State of Michigan and the Constitution of the United States.

For those reasons the Court will sign an order which denies the relief prayed for by the plaintiffs, but costs are not to be awarded. The Court will sign an order to that effect.

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF

OAKLAND

BORIS KARPENKO, TETIANA KARPENKO, et al,

Plaintiffs,

v.

Civil Action
No. 76-141817-AZ

CITY OF SOUTHFIELD, a municipal corporation, A.J. ETKIN CONSTRUCTION COMPANY, a Michigan corporation, and LAWRENCE INSTITUTE OF TECHNOLOGY, a Michigan nonprofit corporation, jointyly and severally,

Defendants.
_____/

MICHAEL B. SERLING (P20225)
Attorney for Plaintiffs

JAMES D. TRACY (P21531)
Attorney for Defendant,
Lawrence Institute of Technology

THOMAS A. ROACH (P19476)
Attorney for Defendant,
A.J. Etkin Construction Company

SIGMUND BERAS (P10708)
Attorney for Defendant,
City of Southfield

_____/

JUDGMENT

At a session of said Court held on the_____day of July, 1976, in the Court House Tower, Pontiac, Michigan.

PRESENT: THE HONORABLE JAMES S. THORBURN, Circuit Judge

This cause having come on for trial before the Court on the Complaint of Plaintiffs praying for (a) determination that City of Southfield Ordinance No. 576, adopted in June, 1968, is unconstitutional, (b) reestablishment of the zoning classification of certain real estate owned by Defendant Lawrence Institute of Technology in the City of Southfield, Oakland County, Michigan, which existed prior to enactment of said Ordinance 576, and (c) entry of an order for a permanent injunction against construction of a certain nine storey dormitory on said property of Lawrence Institute of Technology. The answer to Plaintiffs' Complaint was stated orally on the record by Defendants

at a hearing before this Court on June 30, 1976.

There being no issues of material fact, and the Court having fixed July 1, 1976, as the date for trial of this matter, and all parties being present in Court on that day; and

The Court having heard oral argument of counsel and having considered briefs and citations of legal authority presented by counsel for all parties; and

The Court, after conclusion of oral argument having rendered its opinion stating findings of fact and conclusions of law, hereby determines that because of the responsible actions of counsel for both plaintiffs and defendants in bringing the matter to issue for final determination by the Court without undue delay or necessity of presentation of proofs, it is not appropriate to award costs against any party.

NOW, THEREFORE, IT IS ORDERED, ad-

judged and decreed that the prayer of the Complaint for preliminary and permanent injunctive relief against Defendants, and for other relief, is hereby denied and the Complaint is dismissed with prejudice.

IT IS FURTHER ORDERED, adjudged and decreed that no costs are awarded to any party.

JAMES S. THORBURN
Circuit Court Judge

APPROVED AS TO FORM ONLY AND
NOTICE OF PRESENTMENT WAIVED:

_____
Attorney for Plaintiffs

DYKEMA, GOSSETT, SPENCER, GOODNOW & TRIGG

By: _____
Attorney for defendant Lawrence Institute of Technology

McCLINTOCK, DONOVAN, CARSON & ROACH

By: _____
Attorney for defendant A.J. Etkin Construction Company

CITY OF SOUTHFIELD

By: _____
Sigmund Beras,
City Attorney

STATE OF MICHIGAN

COURT OF APPEALS

BORIS KARPENKO, TETIANA KARPENKO, ANNA DEKAM, JOAN DEKAM, VICTOR BRADLEY, MARGARET BRADLEY, ROBERT PETROVICH, BORICA PETROVICH, MATHEW ST. ANGELO, JANET ST. ANGELO, CARL GILGALLEN, PAT GILGALLEN, JOSEPHINE LYNCH, HERBERT FRIEBE, RUTH FRIEBE, DONALD LAHTI, HANNAH LAHTI, WILLIAM WINER, ROSE WINER, THADDIUS KONECKI, WANDA KONECKI, RONALD HULEWICZ, SUSAN HULEWICZ, ROBERT CORRIGAN, ANN CORRIGAN, RICHARD BONDIE, ELIZABETH RATKUS, CHARLETTE MARTINUZZI, GUIDO MARTINUZZI, DEL SCODELLARO, ROSE SCODELLARO, MARIAN VALDES, GEORGE BEAUDIAN, EDNA BEAUDIAN, ESAM SARAFA, JOSEPHINE SARAFA, RAY STEVENS, MARGARET STEVENS, GEORGE MALESKY, DORIS MALESKY, STANLEY SHAPIRO, EDMUND KURKOROWSKI, IRENE KURKOROWSKI, JACK CROCKER, GLORIA CROCKER, RONALD BARRY, NORMA BARRY, PHILLIP CANDELLA, RITA CANDELLA, NICK MADIAS, ORTON HAMILTON, LOIS HAMILTON, DAVID SILVERMAN, PAT SILVERMAN,

Plaintiffs-Appellants,

vs.

No. 29509

CITY OF SOUTHFIELD, a municipal corporation, ETKIN, JOHNSON & KORB, a Michigan corporation, and LAWRENCE INSTITUTE OF TECHNOLOGY, a Michigan non-profit corporation, jointly and severally,

Defendants-Appellees.

/

before: M.J. Kelly, P.J., and J.H. Gillis and R.M. Maher, JJ., M.J. Kelly, J.

The issue is whether the notice provisions of the zoning enabling act, MCLA 125.584; MSA 5.2934 are unconstitutional as violative of due process and equal protection.

Plaintiffs brought this action on June 28, 1976, seeking damages and to restrain defendants from constructing a nine-story dormitory on land of defendant Lawrence Institute of Technology. Plaintiffs asked the trial court to find unconstitutional a certain Southfield zoning ordinance amendment which rezoned the property in question from single family residential to educational, research and office. Plaintiffs also asked that Michigan's zoning enabling act, MCLA 125.581, et seq; MSA 5.2931 et seq., particularly the notice provisions, MCLA

125.584; MSA 5.2934, be declared unconstitutional. Plaintiffs fault the act because it does not require mailed notice of zoning board hearings to interested parties concerning proposed zoning amendments.

Plaintiffs obtained an order to show cause why a temporary restraining order and preliminary injunction should not issue preventing further construction on the dormitory and enjoining enforcement of the Southfield zoning ordinance amendment. At the show cause hearing on June 30, 1976, the trial court refused to grant the restraining order or the injunction but issued an admonition to defendants: that they proceeded at their own peril since the court would not hesitate to order the dormitory demolished if plaintiffs prevailed. The trial was held the next day and the court ruled against granting the relief

requested by plaintiffs. Plaintiffs appeal from that decision.[1]

I

Do the notice provisions of the zoning enabling act, MCLA 125.584; MSA 5.2934, satisfy the standards of due process imposed by the Federal and State constitutions in that they only require a city to furnish notice of hearings by publication?

MCLA 125.584; MSA 5.2934 provides in pertinent part:

"The legislative body of a city or village may provide by ordinance for the manner in which regulations and boundaries of districts or zones shall be determined and enforced or, from time to time, amended, supplemented, or changed. A public hearing shall be held before a regulation shall become effective. Not less than 15 days' notice of the time and place of the public hearing shall first be published in an official paper or a paper of general circulation in the city or village, and not less than 15 days' notice of the time and place of the public hearing shall first be given by registered United States mail to each public utility company and to each railroad company owning or operating any public utility or railroad within the districts or zones affected, and a hearing be granted a person interested at the time and place specified."

We have been unable to find any Michigan case dealing with due process challenges to the above provision. Plaintiffs rely principally on Dow v State of Michigan, 396 Mich 192; 240 NW2d 450 (1976) for the proposition that notice by publication is insufficient. In Dow the court held that notice by publication of tax foreclosure proceedings was inadequate as to real property interests of record. The Court reasoned:

"The 'opportunity to be heard' includes the right to notice of that opportunity. 'An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" Mullane v Central Hanover Bank & Trust Co, supra, p 314

* * *

"Newspaper publication is a formality. A few institutional lenders may hire persons to scan such notices, but newspaper publication for most property owners provides no notice at all.

'Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circuation the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when, as here, the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention. In weighing its sufficiency on the basis of equivalence with actual notice we are unable to regard this as more than a feint.' Mullane v. Central Hanover Bank and Trust co, supra p 315 (Emphasis supplied.)"
396 Mich at 205-206, 207-208. (Emphasis in original).

In Dow the interests involved were significant real property interests which were being foreclosed by the Sta-te of Michigan. The plaintiffs in Dow were land contract purchasers and the titleholder of the real property, who had lost their respective interests in the property with no actual notice. In the present case, plaintiffs' interests arise from their status as adjoining and neighboring property owners and their interests in the rezoning of a parcel of land in close proximity to their property is not as significant as the interests of the plaintiffs in Dow. It has been held that nearby property owners have no vested interest in zoning classifications.[2]

Plaintiffs argue that negative reciprical easements gave them a significant interest in the 1968 rezoning classification. Certain deed restrictions which bound plaintiff and defendant Lawrence Institute expired in 1970. Such restrictions could have been enforced despite a less restrictive zoning classification.[3] We find the existence of deed restrictions to be irrelevant to the question of whether individual mailed notice of proposed rezoning is constitutionally required.

The question is whether notice by publicication is reasonably calculated under these circumstances to inform interested parties of the pendency of the action and afford them an opportunity to present objections. In Harter v. Schwartz Creek, (on rehearing) 68 Mich App 403; 242 NW2d 792 (1976) this Court found that notice by publication was sufficient to inform property owners of an increase in ad valorem taxation, even though plaintiff, a landowner and taxpayer in Schwartz Creek, was a resident of Bloomfield Hills.

This Court stated:

"Turning to the circumstances of this case, we face the inevitable: the message of Mullane [v Central Hanover Bank & Trust Co, 339 US 306; 70 s Ct 652; 94 L Ed 865 (1950)] and Alan [v Wayne County, 388 Mich 210; 200 NW2d 628 (1972)] is that any determination of the constitutionality of a particular statutory notice scheme will be essentially judgmental. Our concern, in the absense of hard and fast rules, is to avoid the unpredictability generated by approving a totally unrestrained ad hoc approach."

"While we have determined that plaintiff has a right to notice, the balancing approach of Mullane and Alan requires us to specifically weigh plaintiff's right against the factors of economy and practicability in determining the form that this notice must or should take. In Mullane, plaintiffs were the of a trust; the Court expressly found their property interest to be 'substantial', and notice by publication only was deemed insufficient. Both Ridenour, supra [v County of Bay, 366 Mich 225; 114 NW2d 172 (1962)] and International Salt, supra, [v Wayne County Drain Commission, 367 Mich 160; 116 NW2d 328 (1962)] involved special assessment districts and stand for the proposition that in such cases publication of notice in a local newspaper would always be constitutionally deficient as to known parties. By contrast, the property right to be free from an increase in general ad valorem taxation is qualitatively less compelling." (Emphasis in original.) 68 Mich App at 407.

We find this reasoning applicable to the case at bar. In balancing plaintiff's rights to notice against economy and practicality in determing the form of notice,

we hold that notice by publication is sufficient. See Lanphear v Antwerp Township, 50 Mich App 641, 652-653; 214 NW2d 66 (1973). We also find plaintiff's interests "qualitatively less compelling" than the interests recognized in Dow, supra.

Courts in other jurisdictions have uniformly held that notice by publication is sufficient and lack of individual mailed notice is not a denial of due process. Annot, 96 ALR 2d 449, sec. 4, pp 459-461 and 96 ALR 2d Supp, sec. 4, p 311.

Although we agree that newspaper notice is not the type of notice which would inform the greatest number of people, any step requiring individual mailed notice should be taken by the legislature and not by this Court.

II

Do the notice provisions of the zoning enabling act deny plaintiffs equal protection under the Federal and State Constitutions, because notice of proposed zoning amendments is given by registered mail to utilities

and railroads, but only newspaper publication is given to others?

Although the trial court did not specifically rule on plaintiff's equal protection claim, the issue was argued by both sides at trial, and therefore we will consider it.

MCLA 125.584; MSA 5.2934, supra, provides for notice by registered mail to public utilities and railroads within the districts or zones affected by the proposed zoning amendment and notice by publication to all others.

Plaintiffs do not argue that a fundamental interest or a suspect classification is involved in this legislative differentiation. Rather the legislation is of a social or economic character and as such the proper test is the traditional rational basis test. See Manistee Bank and Trust Co v McGowan, 394 Mich 655, 668; 232 NW2d 636 (1975). However, in McGowan, the Court, in striking down Michigan's guest passenger statute, employed the "substantial-relation to the object test", commonly referred to as the "means-scrutiny" test.[4] This test has recently been defined by this Court as follows:

"Under an equal protection analysis the statutory classification or differentiation between similarly situated groups or persons must bear a rational relationship to a legitimate state purpose or be based upon a ground of difference having a fair and substa-ntial relationship to a legitimate object of the legislation." People v McDonald 67 Mich App 64, 71; 240 NW2 268 (1976) (Citations omitted).

In applying this test to the present case, we find the notice provisions constitutional. The interests of utilities and railroads are vastly different from plaintiffs'. In addition to their easements, which are recognized property rights, the utilities and railroads need actual knowledge of proposed rezoning to plan for expansion and future construction. Thus, plaintiffs and these companies are not "similarly situated" so as to require equal treatment under the equal protection clauses. We find the classification reasonably related to a legitimate state purpose.

In light of our decision, it is unnecessary to discuss the remaining

issues.

Affirmed. No costs, a public question being involved.

FOOTNOTES

1. Claim of appeal was filed July 20, 1976. Plaintiff sought a stay of proceedings and injunction without bond pending appeal; this motion was denied by this Court on August 30, 1976. According to defendants' brief, on September 29, 1976 the Michigan Supreme Court denied defendants' application for leave to appeal prior to decision by the Court of Appeals, and also denied plaintiffs' motion for stay of proceedings and injunction without bond. The Supreme Court further denied plaintiffs' application for leave to appeal from the August 30, 1976 order of this Court, and denied plaintiff's motion for stay of proceedings and injunction without bond pending appeal.

2. Lamb v City of Monroe, 358 Mich 136; 99 NW2d 566 (1959), Baker v. City of Algonac, 39 Mich App 526; 198 NW 2d 13 (1972), Ivden, 388 Mich 769 (1972). But see D'Agostini v City of Roseville, 396 Mich 185; 240 NW2d 252 (1976).

3. Phillips v Lawler, 259 Mich 567; 244 NW 165 (1932), Brideau v Grisson, 369 Mich 661; 120 NW2d 829 (1963).

4. In Manistee Bank and Trust v. McGowan, 394 Mich 655, 671; 232 NW2d 636 (1975), Justice Levin writing for the majority stated:

"So, too, is the choice of test a matter of judgment. In my judgment, at least where the challenged statute carves out a discrete exception to a general rule and the statutory exception is no longer experimental, the substantial-realtion-to-the-object test should be applied."

AT A SESSION OF THE SUPREME COURT

OF THE STATE OF MICHIGAN

Held at the Supreme Court Room,

in the City of Lansing, on the

25th day of October, 1977.

PRESENT the HORORABLE

THOMAS GILES KAVANAGH,
Chief Justice,

G. MENNEN WILLIAMS,
CHARLES L. LEVIN,
MARY S. COLEMAN,
JOHN W. FITZGERALD,
JAMES L. RYAN,
BLAIR MOODY, JR.
Associate Justices

CR 20-122

BORIS KARPENKO, et al,

Plaintiffs-Appellants,

vs.

CITY OF SOUTHFIELD, a municipal corporation, ETKIN, JOHNSON & KORB, a Michigan corporation, and LAWRENCE INSTITUTE OF TECHNOLOGY, a Michgian non-profit corporation, jointly and severally,

Defendants-Appellees.

COA: 29509
LC: 76-141817-AZ

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because the appellants have failed to persuade the Court that the questions presented should be reviewed by this Court.

STATE OF MICHIGAN - ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 25th day of October, 1977.

Harold Hoag, Clerk

CALIFORNIA STATUTE

The statute, West's Annotated Government Code for California 65854.5(a) provides,

> "(a). In addition to the notice required in Section 65854, a county or city planning commission shall give notice of a hearing by mail or by delivery to all persons, including businesses, corporations or other public or private entities, shown on the last equalized assessment roll as owning real property within 300 feet of the property which is the subject of the proposed zoning change."
>
> "(b). In the event that the number of owners to whom notices should be sent pursuant to subdivision (a) is greater than one thousand, a county or a city may, as an alternative to the notice required by subdivision (a) provide notice pursuant to this subdivision. Such notice shall be given at least 10 days prior to the hearing by either of the following proceedures: (i) by placing a display advertisement of at least 1/4 page in the newspaper having the greatest circulation in the area affected by the proposed ordinance or amendment and in at least one additional newspaper having general circulation in such area, if such additional newspaper is available; or (ii)

by placing an insert within the generalized mailing sent by the county or city property owners in the area affected by the proposed ordinance or amendment, such as billing for county or city services..."

TEXAS STATUTE

In Article 1011 f of the Civil Statutes of the State of Texas, a provision is made that zoning commissions shall hold public hearings before submitting final reports to the legislative body. The statute further provides that written notice of all public hearings before the Zoning Commission on proposed changes in classifications shall be sent to owners of real property lying within 200 feet of the property on which the change in classification is proposed.

MICHIGAN COMPILED LAWS ANNOTATED

Sec. 125.584 City zoning ordinances; public hearing, notice; report of planning commission; amendment; vote required

Sec.4. The legislative body of a city or village may provide by ordinance for the manner in which regulations and boundaries of districts or zones shall be determined and enforced or, from time to time, amended supplemented, or changed. A public hearing shall be held before a regulation shall become effective. Not less than 15 days' notice of the time and place of the public hearing shall first be published in an official paper or a paper of general circulation in the city or village, and not less than 15 days' notice of the time and place of the public hearing shall first be given by registered United States mail to each public utility company and to each railroad company owning or operating any public utility or railroad within the districts or zones affected, and a hearing be granted a person interested at the time and place specified. In cities having a population of 25,000 or more, the legislative body may appoint a commission to recommend in the first instance the boundaries of districts and appropriate regulations to be enforced therein. The commission shall thereupon make a tentative report and hold public hearings thereon at such times and places as the legislative body shall require before submitting its final report. In cities having a population of 25,000 or more the hearing before the legislative body shall not take place until the final report

of the commission has been received, nor shall the ordinance or maps be amended after they are adopted in the first instance until the proposed amendment has been submitted to the commission and it has made report thereon. In either case the legislative body may adopt the ordinance and and maps with or without amendments, or refer the ordinance and maps again to the commission for a further report. Where a city has a city plan commission or corresponding commission, the legislative body may appoint that commission to perform these duties. After the ordinance and maps have in the first instance been approved by the legislative body of a city or village, amendments or supplements thereto may be made from time to time as above provided. An amendment to a zoning ordinance may be passed only by a 2/3 vote of the local legislative body, unless a larger vote, but not to exceed 3/4 vote, is required by ordinance or charger, if a protest against the proposed amendment is presented to the legislative body at or before the public hearing required by this section to be held by the legislative body and the protest is duly signed by:

(a) The owners of at least 20% of the area of land included in the proposed change; or

(b) The owners of at least 20% of the area of land included within an area extending outward 100 feet from any point on the boundary of the land included in the proposed change excluding public right of way.

IN THE SUPREME COURT OF THE

STATE OF MICHIGAN

BORIS KARPENKO, TETIANA KARPENKO,
ANNA deKAM, et al.,

Appellants,

vs.

COA 29509
LC 76-141817 AZ

CITY OF SOUTHFIELD, et al.,

Appellee

NOTICE OF APPEAL TO THE

SUPREME COURT OF THE UNITED STATES

I. Notice is hereby given that ANNA deKAM, et al., one of the appellants above named hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeals of the State of Michigan affirming the decision of the trial court and the deniel of appellants claim by the Supreme Court of the State of Michigan after consideration of appellants application for leave to appeal entered in this action on October 25, 1977.

This appeal is taken pursuant to 28 USC 1257(2).

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

Opinion and Order

III. The following questions are presented by this appeal:

(1) Whether Michigans Zoning Enabling Act, which provides in part, that the local legislative body shall provide notice by newspaper publication prior to public hearing upon rezoning requests, is repugnant to the United States Constitution in that it denies due process of law to adjoining landowners encumbered by negative reciprocal easements including the property to be rezoned without requiring actual notice of said hearing.

(2) Whether statutes failing to provide for actual notice to readily identifiable parties regarding hearings to rezone property encumbered by negative reciprocal easements constitute an unconstitutional taking of substantial property rights without due process of law; or whether property abutting, adjacent and in close proximity to rezoned property is to be afforded the same Constitutional rights.

Eugene Ostrowe
Attorney for Appellants
27301 W. Seven Mile Rd.
Detroit, MI 48240

PROOF OF SERVICE

I, Julie F. Ebert, secretary in the office of Eugene Ostrowe, attorney of record for Appellants, herein, depose and say that on the 16th day of January, 1978, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on the City of Southfield, A.JEtkin Construction Co., and Lawrence Institute of Technology Appellees herein, by depositing same in U.S. mails for delivery at their respective addresses:

26000 Evergreen Rd, Southfield, MI
10111 Capital, Oak Park, MI
21000 W. Ten Mile Rd, Southfield, MI

Julie F. Ebert

Subscribed and sworn to before me, at

the 16th day of January, 1978.

Gale J. Pank, Notary Public
Oakland County, Michigan
My commission expires: 12/16/78